

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. S-02/12-93
)
 Appeal of)

INTRODUCTION

The petitioners appeal the lack of a decision by the Department of Vermont Health Access (DVHA) regarding their request for Medicaid coverage for planning and coordination services and behavioral clinical supports for their daughter, "A". The issues are whether the petitioners have made a showing that the requested services are medically necessary and whether DVHA and DAIL have properly considered their request under Medicaid "EPSDT" criteria.

The following history and background information is based on documents in the record generated by agents of the Vermont Department of Disabilities, Aging, and Independent Living (DAIL) and on the written filings and oral representations of the parties' attorneys at and pursuant to the several telephone status conferences that have been held in this matter.

DISCUSSION

On or about December 21, 2011 the petitioners applied to DAIL for funding for their daughter to receive certain home based services under Vermont's "Medicaid waiver" for Developmental Disability Services (hereinafter referred to as "DD Waiver" services). It appears that their request was prepared (according to policy and protocol) by an employee of the local community health care agency, and was considered by a "local screening committee" of that agency.

The petitioners' funding request included the following "background":

[A] is a 15 year old female with a diagnosis of Autism and is also nonverbal. She lives in Windsor, VT with her parents and her twin sister, who also has a diagnosis of Autism. [A] has attended the Windsor School District since 2008 when the family moved from Florida. She has always received special education services, in Florida and in Vermont. [A] is currently in an alternative school program to address her behavioral needs where she is one of two students.

[A's] mother is from Cuba and her father is from Uruguay so there are some communication barriers which has made finding and navigating services difficult for the family. The family uses an interpreter to assist in meetings, but does not always have access to her services.

[A] has behavioral needs that have become increasingly more difficult to manage over the past year. She has tantrums which involve ripping her clothing off, hitting herself, biting herself, and slamming her hand on hard surfaces/objects. During these tantrums [A] has also

injured others around her who were trying to keep her safe, including her sister.

[A] responds well to significant behavioral structure in her school setting but continues to be highly challenging at home where she has a sleep disorder, screams, and engages in property destruction and aggression. [A] is not able to go in to the community often because she has historically engaged in disrupting or destructive behavior. Her parents are finding it very difficult to keep [A] safe and are ultimately home-bound.

The funding request also included the following "Requested Supports":

Service Planning & Coordination: 2 hrs/wk @ \$48.66/hr = \$5,061

Service Coordination will work to ensure that the behavior supports are in place so that [A] can learn the skills needed to ensure her safety, the safety of those around her as well as being sure that she stays out of the hospital and home with her family. [A] is a very complicated young woman with a number of challenges and without the proper supports in place she will hurt herself and others.

Behavioral Clinical Supports that include:

3 hours of 1:1 support Monday through Friday @ \$30/hr = \$23,400

10 hours of 1:1 support over the weekend (5 on Saturday, 5 on Sunday) = \$15,600

4 hours per week of consult/training/supervision for staff members @ \$70/hr - \$14,560

One-time 6 hour support training @ \$100/hr = \$600

Interpreter 1 hour per week = \$5,000

44 additional days (5 hours per day) for school vacations/breaks/summer @ \$30/hr - \$6,600

On January 6, 2012 the local agency's "intake coordinator" sent the petitioners a notice denying DD Waiver funding in that A did not meet the "funding priority" of "Preventing Institutionalization--Psychiatric Hospitals and ICF/DD". As a result, the local screening committee determined that the petitioners' request for funding "will not be presented at the State Equity Committee".

On February 10, 2012, the Human Service Board received a request for hearing from the petitioners' attorney (dated February 8, 2012) "to appeal the denial of a Medicaid waiver by the Department of Disabilities, Aging and Independent Living". The request was accompanied by a copy of another letter (also dated February 8, 2012) to the attorney for the Department of Vermont Health Access (DVHA), which included the following:

On behalf of [I.S.] and [W.G.] I am requesting that Vermont Medicaid provide [A], a sixteen year old Vermont Medicaid recipient, with the following Medicaid services:

Service Planning and Coordination
Behavioral Clinical Supports

Please see the enclosed Request for Funding for further description of the medical necessity of these Medicaid covered services at pages 3 and 4.

As you know, under the EPSDT provision of the Medicaid Act, [A] is entitled to receipt of these services if

they are necessary to correct or ameliorate any physical or mental health conditions.

I am anticipating that DVHA will review this request for services in the same manner as requested by the hearing officer in the B.H. and S.G. fair hearings as this case is factually and legally identical to those two cases. Please feel free to get in contact with me if you have questions or concerns.

That same date (Feb. 10, 2012) the Board sent notices to the petitioners and their attorney, and to the attorneys for both DAIL and DVHA, setting the matter for a telephone status conference on March 12, 2012. On March 12, all three attorneys participated in the status conference, at which time the petitioners' attorney represented that they were appealing *both* DAIL's decision that their request did not meet DD Waiver "funding priorities" and any decision by DAIL or DVHA that the requested services were not otherwise covered by "regular" Medicaid under the criteria for EPSDT¹ for children. The petitioners' attorney agreed to file a written memorandum regarding EPSDT coverage, and to identify any specific requests for Medicaid coverage under the exception provisions of § 7104 if the petitioners felt that any of their requested services might not be covered under EPSDT.

¹Early and Periodic Screening, Diagnosis and Treatment (see 42 U.S.C. § 1396d[a][4][B]).

The petitioners' Memorandum, dated April 2, 2012, was received by the Board on April 4, 2012. Another telephone status conference was held with the three attorneys on May 8, 2012. The parties agreed at that time that DAIL would refer the case to its state equity committee for reconsideration of whether the petitioners' request met the funding priorities of the Medicaid waiver program. At the status conference the petitioners reiterated their position (clearly set forth in their memorandum) that even if DAIL again denied their request under the DD Waiver funding priorities, DVHA should grant Medicaid coverage of the requested services under EPSDT.

Another status conference was held on June 12, 2012.² DAIL informed the parties and the Board that its state equity committee had recently denied the petitioners' request for DD Waiver funding. In a written notice dated that same day DAIL confirmed this decision.

On July 17, 2012 DVHA submitted a memorandum of law and a motion to dismiss DVHA as party to the matter. On July 27, 2012 the petitioners filed a motion for summary judgment, with an accompanying memorandum of law.

²As a result of switches by the AAGs in their coverage of certain districts, a different AAG appeared for DVHA at the June status conference.

At a brief telephone status conference held on August 15, 2012 DAIL indicated that it wished to file a written response to the petitioner's motion for summary judgment. DAIL filed its written opposition to the petitioner's motion for summary judgment on August 24, 2012. At another brief telephone status conference held on September 10, 2012 the hearing officer informed the attorneys for the petitioner and DAIL that he considered the matter ready for the Board's consideration.³

ORDER

The Agency of Human Services, through DVHA, shall grant Medicaid coverage for the services requested by the petitioners under EPSDT, or order DAIL to do so.

³The attorney for DVHA was on vacation on August 15, 2012 and did not participate in the telephone status conference held on that date. In an email dated August 8, 2012 he indicated that the petitioners' attorney had told him that they had "no objection" to DVHA being dismissed as a party. Although there is no indication that DAIL agreed to this, the record indicates that DAIL did not provide DVHA's attorney with a copy of its memorandum filed on August 24. The hearing officer assumes that the parties agreed that DAIL, rather than DVHA, would respond to the petitioners' arguments regarding EPSDT (which it did). DVHA was not notified of and did not participate in the brief telephone status conference that was held on September 10, 2012. At that status conference the hearing officer orally informed the petitioners and DAIL that he had already determined that DVHA, as the overall administrator of the Vermont Medicaid program, was required to provide Medicaid services to eligible children under EPSDT. Rather than delay the matter further, the hearing officer instructed DAIL's attorney to notify DVHA of that decision. Inasmuch as no further oral arguments were taken after the June 12, 2012 status conference, in which DVHA participated, and insofar as DVHA filed its written argument on July 17, 2012, there has been no prejudice to DVHA concerning its nonparticipation in the telephone status conferences held on August 15 and September 10, 2012.

REASONS

There does not appear to be any dispute in this case that the petitioners' daughter is eligible for Medicaid (Dr. Dynasaur). DVHA's argument, summarized in its memorandum, is as follows:

By statute and by contract, responsibility for assessing the appropriateness of services for Medicaid recipients with special needs is delegated to DAIL, and any such assessment must be conducted according to DAIL's rules, regulations, policies and guidelines. This makes sense in view of the need for specialized expertise and experience with regard to this population that DAIL was statutorily created and directed to serve. The Human Services Board lacks authority to disturb these arrangements.

As noted above, the evidence in this matter, in the form of the evaluation of the petitioners' daughter done by the community mental health agency *under the auspices of DAIL* in connection with the petitioners' request for a DD Waiver (see *supra*), is clear and uncontroverted that she has a medical need for the requested services. However, a criterion to qualify for funding under that program is meeting the "funding priority" that the service is necessary "to prevent or end imminent institutionalization in inpatient public or private psychiatric hospitals or nursing facilities". (See Sec. Four (A), Vermont State System of Care Plan for Developmental Disabilities Services, FY 2012-2014.) As noted

above, DAIL has determined that the petitioner's condition does not meet this criterion. The petitioners also argue, however, that their daughter meets the medical necessity standard *as defined in the EPSDT program*, and that DAIL and DVHA cannot deny Medicaid coverage for these services under EPSDT.

Federal law (42 U.S.C. § 1396d[a][13]) requires states to provide EPSDT-eligible children with:

. . . other diagnostic, screening, preventive, and rehabilitation services including any medical or remedial services (provided in a facility, home or other setting) recommended by a physician or other licensed professional of the healing arts within the scope of their practice under State law, *for the maximum reduction of physical or mental disability and restoration of an individual to the best functional level.* (Emphasis added.)

The Vermont Medicaid regulations incorporate the expansive nature of the EPSDT program by the following language in W.A.M. § 4100:

The scope of coverage for children under the Early Periodic Screening, Diagnosis and Treatment (EPSDT) provisions of Title XIX is different and more extensive than coverage for adults. The EPSDT provisions of Medicaid law specify that services that are optional for adults are mandatory covered services . . . when such services are determined necessary. . . Specifically, Vermont is required to provide

. . . such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of [1396d] to correct or ameliorate defects and physical and mental

illnesses and conditions discovered by the screening services, *whether or not such services are covered under the State [Medicaid] plan.* 42 U.S.C. § 1396d(r)(5). (Emphasis added.)

The Board and the Vermont Supreme Court have emphatically held that the above provisions are to be liberally interpreted and applied. Fair Hearing No. B-06/11-354; *Jacobus v. Dept. Of PATH*, 177 Vt. 496 (2004).

Neither DVHA nor DAIL has provided any legal basis or authority for the proposition that Vermont children with special needs are *restricted* only to those medical services provided under the DD Waiver program administered by DAIL, and that those children who do not meet DAIL's "funding priorities" are somehow *barred* from receiving any other medically necessary services under EPSDT Medicaid criteria. Thus, the argument by DVHA that *all* Medicaid coverage decisions regarding children with special needs can *only* be made by DAIL under the DD Waiver criteria is a red herring. To resolve this case the Board need not (as DVHA would apparently have it) consider whether DAIL's funding priorities (which limit DD Waiver services to children facing institutionalization) are invalid in order to determine whether medically necessary services can be provided under EPSDT to special needs children who do not face

hospitalization.⁴ DAIL is correct that the pertinent statutes and regulations are clear that only children facing hospitalization are eligible for DD Waiver services administered by DAIL. However, the statutes and regulations are also clear that children, like the daughter of the petitioners herein, who do *not* meet DD Waiver funding criteria, are nonetheless fully eligible for *all other medically necessary services* under the EPSDT program administered by DVHA.

In its written argument filed on August 24, 2012 DAIL cursorily, and without citing any other medical evidence, argued that it “does not find that the (requested) supports are medically necessary” based on the screening of the petitioners’ daughter done on October 5, 2011. However, inasmuch as this “finding” by DAIL so plainly contradicts the assessment and recommendations of its own designee (which performed that screening), and in that it seemingly ignores the liberal definitions of medical necessity found in the federal statute and state regulations (*supra*), it cannot be concluded that there is any *bona fide* dispute of any material

⁴ However, it certainly appears that DVHA is free to do so under the interagency “agreements” cited in its Reply argument, dated September 27, 2012.

fact in this matter regarding the medical necessity of the services sought by the petitioners for their daughter.

Inasmuch as the record in this matter (see *supra*) clearly establishes that the services sought by the petitioners for their daughter are medically necessary, DVHA is required under the above federal and state statutes and regulations to provide (or order DAIL to provide) the petitioners' daughter with Medical coverage under the EPSDT criteria set forth in W.A.M. § 4100 (*supra*), *whether or not she meets DAIL's funding priorities under the DD Waiver program*. At this time, in light of the foregoing, the record in this matter compels the Board to order DVHA to cover the services in question. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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